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NO. 84-321

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1983

STATE OF ALABAMA, PETITIONER

VS.

EARNEST JAMES STURDIVANT, RESPONDENT

ON PETITION FOR A WRIT OF
CERTIORARI TO THE SUPREME COURT AND
COURT OF CRIMINAL APPEALS OF ALABAMA

REPLY BRIEF AND ARGUMENT

OF

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REPLY ARGUMENT

This brief is filed in response to the Respondent's opposition memorandum.

A.

THE ALABAMA SUPREME COURT CONSTRUED THE UNITED STATES CONSTITUTION IN THIS CASE

The Alabama Supreme Court stated the issue before it as follows:

> "...Sturdivant asserts that he was denied the effective assistance of counsel because Blair failed to comply with the requirements of Anders v. California, 386 U.S. 738 (1967). In Anders, the Court addressed the 'extent of the duty of a court-appointed appellate counsel to prosecute a first appeal from a criminal conviction, after that attorney has conscientiously determined that there is no merit to the indigent's appeal.'..." See Appendix "B" to the Petition, page 6.

The Court then went on to state the facts in Anders and discuss the case generally. This Honorable Court's decision in Anders

was cited by the Alabama Supreme Court some five times. The State Supreme Court quoted Anders twice, once extensively. Appendix "B", pages 7 and 8-9. The Alabama Supreme Court based its holding on the following finding:

> "...In the case at bar, the requirements of Anders were not followed...." (Appendix "B", page 10).

The Alabama Supreme Court's holding read as follows:

> "...Accordingly, we have no option but to follow the mandate of the Anders opinion and, therefore, we must reverse the judgment of the Court of Criminal Appeals...." (Appendix "B", page 11)

On remand, the Court of Criminal Appeals ruled:

> "...The Supreme Court of Alabama has determined that the requirements of Anders v. California, 386 U.S. 738 (1967), were not followed in this case...." (Appendix "D", page 18)

What the Petitioner cannot understand is how learned Counsel can argue that the Alabama Supreme Court's decision was based on state, rather than federal Constitutional, law.

B.

THE APPLICABILITY OF STRICKLAND V. WASHINGTON

The Respondent argues that since Strickland v. Washington (___ U.S. ___, 80 L.Ed.2d 674, 104 S.Ct. ___ [1984]) involved trial, as opposed to appellate counsel, its standards do not apply to counsel on appeal. This issue is discussed at some length in the Petition at pages 21-27. On this point, the Petition concludes:

> "...[I]t cannot be argued that performance by appellate counsel which passes muster under the Sixth Amendment standards for trial counsel, would miss the mark of effective assistance of counsel on appeal...." (Petition, pages 26-27).

The fact is that this Honorable Court has never passed on the issue of the effective assistance of counsel in taking an appeal. This Court's decisions have only addressed the question of counsel's duties once an appeal is perfected: In a non-frivolous appeal counsel must file a brief (Anders v. California, 386 U.S. 738, 18 L.Ed.2d 493, 87 S.Ct. 1396 [1967]) but need not brief every non-frivolous issue (Jones v. Barnes, ___ U.S. ___, 77 L.Ed.2d 987, 103 S.Ct. ___ [1983]).

The point here is, as stated in the Petition, if the Strickland standards are appropriate at the trial level, where trial and trial counsel are expressly guaranteed by the Constitution, there is no logical way that a more stringent standard could be required on appeal.

C.

PREJUDICE

The Respondent argues that prejudice should be presumed from an attorney's not taking an appeal. There are two problems with this:

First, prejudice is not presumed from an attorney's acts or omissions. Strickland v. Washington, ___ U.S. ___, 80 L.Ed.2d 674, 104 S.Ct. ___ (1984).[1]

Second, error is not presumed in appeals, indeed the presumption is that of correctness. Ross v. Moffitt, 417 U.S. 600, 51 L.Ed.2d 341, 94 S.Ct. 2437 (1974);[2] Hicks v. State, 437 So.2d 1344

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1. "...The defendant must show that there is a reasonable probability that, but for counsel's professional errors, the result of the proceeding would have been different...." (80 L.Ed.2d 674, 698)

2. See the language quoted at pages 22-23 of the Petition.

(Cr.App.ala., 1982);[3] Aff'd 437 So.2d 1346 (S.Ct. Ala., 1983).

Of course, a defendant claiming prejudice from his attorney's improper[4] failure to appeal a conviction and having made a colorable claim of possible error, might well need a transcript or a portion thereof to meet his burden of showing prejudice. In such a case, a non-indigent could obtain a transcript, while one would be provided free to an indigent. However, the instant case is not such a case. Here neither the defendant nor his former attorney nor his new attorneys could suggest any possible

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3. See the brief digest at note 10, page 25, of the Petition.

4. Remember, prejudice is only one component of the Strickland standard. See 80 L.Ed.2d 674, 699.

error and the only evidence on the subject is that any appeal would have been frivolous.

CONCLUSION

In conclusion, the Petitioner State again respectfully submits that the decision and opinion of the Alabama Supreme Court in this case conflicts with the prior decisions of this Honorable Court on the respective rights and duties of convicted persons and their attorneys in the taking of appeals and on the standards for the effective assistance of counsel under the United States Constitution. For these reasons, the Petitioner again prays that this Honorable Court will issue the writ of certiorari and review the decisions and

opinions of the Honorable Appellate Courts of Alabama and on such review will reverse the decisions of said Courts to the extent that the same hold that the conduct of the attorney in this case violated the United States Constitution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, an Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, Petitioner, do hereby certify that on this ___ day of September, 1984, I did serve the requisite number of copies of the foregoing on the Attorneys* for Earnest James Sturdivant, Respondent, and a courtesy copy on his former attorney** by mailing same to them, first class postage prepaid and addressed as follows:

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